competitive provision by narrowly defining the scope of Section 224's right-of-way provisions.

Right-of-way access does not involve attachment to a particular facility, raising unique issues with respect to the assessment of access rates. Teligent suggests the application of a rate methodology to rights-of-way which reflects the broader principles contained in Section 224, but which avoids the complicating formulaic components of pole attachment rates unsuited for rights-of-way.

II. THE COMMISSION SHOULD AVOID NARROWLY DEFINING THE RIGHTS-OF-WAY TO WHICH SECTION 224 GRANTS ACCESS.

The varied historic interpretations of the term "right-of-way," as well as Section 224's application to both public and private rights-of-way, strongly suggest a broad construction of "right-of-way" for purposes of Section 224. The Commission, in order to accomplish the pro-competitive goals of the Act, should confirm that Section 224 provides access to those areas on building rooftops where utilities enjoy the right of access or use.

A. Rights-Of-Way Are Essential Facilities To Which Competitive Carriers Receive Access Under Section 224.

The Commission is correct to recognize that Section 224 contemplates rights-of-way as separate and distinct from poles, ducts, and conduit.[3] Access to bare rights-of-way will serve an important role in the network construction of facilities-based providers and will facilitate the alternative ubiquitous coverage

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[3] See Notice at ¶ 42.

necessary for meaningful competition. The Commission's development of rules governing access to rights-of-way should be guided by the expectation that competition will arise in various forms, and that regulation should not deter any particular method of offering consumers competitive options.[4] The Commission will promote the development of varied forms of competition by avoiding a narrow construction of rights-of-way.

Historically, utilities obtained their rights-of-way as a function of incumbency and monopoly. Through initial enactment of Section 224 and its extension in 1996 to telecommunications carriers, Congress sought to grant access to the rights-of-way that utilities enjoy as an advantage of incumbency. A broad perspective of the 1996 Act reveals a strategy designed to promote the development of telecommunications competition on the basis of service and rates rather than on the relative ability of a provider to exert monopoly control over facilities essential to the provision of service. Section 224, and the access to rights-

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[4] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 12 (1996) ("Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy. . . . [O]ur obligation in this proceeding is to establish rules that will ensure that all pro-competitive entry strategies may be explored")("Local Competition Order"); see also id. at ¶ 993 ("We believe, as a general policy matter, that all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise").

of-way that it provides, assumes an important role in that design.[5]

It is important for the Commission to recognize the essential facility nature of utilities' rights-of-way. The historic monopoly status of the utilities allowed them to exercise the power, either unilaterally or through statutorily-granted eminent domain authority, to obtain rights-of-way over land and through buildings. Competitive telecommunications carriers, by definition, do not enjoy the position of the monopolist. Their ability to duplicate the incumbents' rights-of-way is rendered impotent not only by the economics of the venture (a venture which the monopolist financed largely under rate-of-return regulation), but also by the plain refusal of local governments and individual building owners to admit the facilities of a subsequent carrier (or, as is commonly encountered, by raising the cost of entry to levels that make it an uneconomic enterprise). Because access to rights-of-way are a critical component of providing competitive service and because they cannot be duplicated, rights-of-way constitute an essential facility.[6]

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[5] See United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988)("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme - because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law").

[6] See MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-1133 (7th Cir. 1982), cert. denied, 464 U.S. 891 (1983).

Regulatory oversight traditionally has imposed broad duties to deal upon regulated utilities which operate concurrent with antitrust laws to enforce general antitrust principles. In these efforts, regulators seek to prevent monopolists from leveraging monopoly power over essential facilities in one market, albeit lawfully derived, to foreclose competitive entry in other markets.[7] The Seventh Circuit used this rationale to hold that a monopolist must make essential facilities available to competitors who could not duplicate the facilities.[8]

Section 224 represents a statutory method of achieving this goal. In its efforts to minimize the prospective operation of historic monopoly power over essential facilities, Congress required the provision to telecommunications carriers of access to, inter alia, rights-of-way under utilities' ownership or control. The intent, when viewed through the lens of even a

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The court described the four elements necessary to establish liability under the essential facilities doctrine: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."

7 See Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law ¶ 787c1 (1996)(noting that "the 'essential facility' doctrine may have some relevance in regulated monopolies where it serves to limit the monopolist's power to expand its monopoly into 'adjacent' unregulated (or less regulated) markets. . . . Although antitrust is not concerned with rates as such, it becomes concerned when the utility's attempt to enlarge profits eliminates competition in a collateral market capable of being competitive").

8 See MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1982), cert. denied, 464 U.S. 891 (1983).

rudimentary antitrust analysis, is clear: Congress sought to diffuse monopoly control over essential facilities to permit the development of competition. It would derogate this goal for the Commission to construe Section 224 in a manner that opens only some essential facilities to competitive use and not others. A narrow interpretation of Section 224 to exclude building access risks perpetuating monopoly control over tenants in buildings, a result at odds with the stated goal of the 1996 Telecommunications Act.[9]

B. A Textual Analysis Reveals The Broad Use Of The Term "Right-Of-Way" In Section 224.

The rights-of-way to which telecommunications carriers are granted access in Section 224 are not limited to public rights-of-way, but include private rights-of-way, as well. Congress used the term "public rights-of-way" in Section 253(c), but omitted the "public" modifier in Section 224. Canons of statutory interpretation advise interpretations that do not render provisions meaningless.[10] The absence of a modifier in

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[9] See Local Competition Order at ¶ 16 (observing that "[v]igorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs").

[10] See, e.g., Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990) (noting the Supreme Court's "deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"); see also, Walters v. Metropolitan Educational Enterprises, 117 S.Ct. 660 (1997)("Statutes must be interpreted, if possible, to give each word some operative effect")(citing United States v. Menasche, 348 U.S. 528, 538-539 (1955)).

Section 224's use of "rights-of-way" strongly indicates that it is not subject to the restriction in Section 253(c) and, thus, includes private rights-of-way, as well as public.

Because Section 224 rights-of-way are not limited to public rights-of-way, they are not limited to streets and other public thoroughfares. Rather, rights-of-way may include a utility's right to use or access parts of a privately-owned building. If that right extends to a building's rooftop, Section 224 would grant telecommunications carrier access to that rooftop right-of-way.

C. Historic Interpretations Assist In Defining The Term "Right-Of-Way" For Purposes of Section 224.

The term "right-of-way" is not defined in the Communications Act. Nevertheless, Congress is not unfamiliar with the term in the context of common carriers as evidenced by other statutes. These statutes, and the cases interpreting them, reveal that rights-of-way are not rarely encountered. Rather, they comprise a legal interest, often less than a fee, to use or pass over another entity's property.[11] Some courts have defined this right as an easement[12] while others describe a right-of-way as a

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11 See Black's Law Dictionary 1326 (6th ed. 1990) (defining a right-of-way as the "[t]erm used to describe a right belonging to a party to pass over land of another"). The Federal Bureau of Land Management's rules offer a definition of right-of-way that supports this broad view: "the public lands authorized to be used or occupied pursuant to a right-of-way grant." 43 C.F.R. § 2800.0-5(g).

12 See, e.g., Bd. of County Supervisors of Prince William County, Virginia v. United States, 48 F.3d 520, 527 (Fed. Cir. 1995)("'Rights-of-way' are another term for easements, which are possessory rights in someone else's fee simple estate"), cert. denied, 116 S.Ct. 81 (1995); see also Great

license or contractual agreement.[13] Regardless of the particulars, rights-of-way encompass a broad conceptual spectrum of property interests and the Commission need not limit the definition of a right-of-way to one particular interest for purposes of Section 224.[14]

Northern Rwy Co. v. United States, 315 U.S. 262, 279 (1942)(rights-of-way granted by the 1875 Right of Way Act to constitute easements). The Right of Way Act of 1875 offers an example of the legislative construction of a right-of-way. The goal of the Right of Way Act, which granted rights-of-way to railroads, is closely analogous to the driving force behind Section 224. The law was designed to promote the public interest by facilitating the construction of nationwide common carrier facilities through grants of access to lands not owned by the common carrier. Interpreting the Act, the Supreme Court determined that Congress used the term "right-of-way" interchangeably with easement. See id. The Court observed that "Congress itself in later legislation . . . interpreted the Act of 1875 as conveying but an easement. The Act of June 26, 1906, declaring a forfeiture of unused rights of way, provides in part that: 'the United States hereby resumes the full title to the lands covered thereby [by the right of way] freed and discharged from such easement.'" Id. at 276 (citations omitted). Moreover, the Court noted that the legislative history of a similar Act passed later that year expressed the view that rights-of-way and easements were to be viewed interchangeably. "The House committee report on this bill said: 'the right as originally conferred and as proposed to be protected by this bill simply grants an easement or use for railroad purposes.'" Id. at 277 (quoting H. Rep. No. 4777, 59th Cong., 1st Sess. at 2).

13 See, e.g., Wilderness Society v. Morton, 479 F.2d 842, 853-54 (D.C. Cir. 1973) ("A right-of-way is most typically defined as the right of passage over another person's land. It has been said that '[a] right of way is nothing more than a special and limited right of use,' a definition that sounds remarkably similar to the special land use permit issued in this case")(citations omitted), cert. denied, 411 U.S. 917 (1973).

14 A textual analysis lends support to this position. Section 224 applies to rights-of-way "owned or controlled" by the utility, demonstrating that an interest less than ownership suffices for the statute's purposes.

D. Fixed Wireless CLECs Will Use Utilities' Rights-Of-Way To Access Building Rooftops For The Provision And Transmission Of Competitive Telecommunications Services.

The construction of the term "right-of-way" will affect the ability of competitive carriers to provide services to buildings as well as the speed with which they do so. Consequently, so, too, is affected the competitive options for the vast number of business and residential building tenants to receive the competitive facilities-based telecommunications service contemplated by the Act. Fixed wireless CLECs will seek access to building rooftops through their right-of-way access rights under Section 224. Rather than attaching distribution facilities to a utility's poles, fixed wireless CLECs transport traffic using radio spectrum. To provide service to a tenant within a building, fixed wireless CLECs such as Teligent will place a small antenna on a building rooftop to transmit and receive the digital microwave telecommunications signals. The antenna must be located on the building being served because a coaxial cable runs from the antenna through a modulator and to the building's cross-connect (often in the basement) where connection with the customer's telephone system is accomplished.

The fixed wireless CLEC use of radio communication promises a number of consumer benefits, not the least of which is lower service rates, but the technology used necessitates a method of accessing the customer that is quite different from the method used by traditional wireline carriers. Teligent's facilities-based service is one of the varied forms of competition the Commission seeks to encourage (and certainly not to

disadvantage). Section 224 contemplates a variety of technologies and must be interpreted to account for varying distribution mechanisms, including those that use rooftops in lieu of telephone poles, so that benefits of competition, in its many forms, can accrue to end users.

III. THE COMMISSION SHOULD ADOPT A RIGHT-OF-WAY RATE METHODOLOGY.

Section 224's formula for calculating reasonable pole attachment rates assumes occupation or sharing of a utility's facility such as a pole or a duct. For this reason, it does not lend itself to application in the right-of-way context. Rights-of-way may hold utility facilities, but the competitive carrier seeking right-of-way access generally will not attach to the utility facility. Instead, the party seeking access will construct its own facility on the utility's right-of-way. Because the utility's actual facilities are not used, an alternative method must be developed to determine whether rates for access to utilities' rights-of-way are reasonable.

A case-by-case approach to the resolution of right-of-way rate and access complaints would fail to provide parties adequate guidance on reasonable negotiation parameters and could increase significantly the administrative burdens of the Commission.[15] By

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[15] The Commission has noted the administrative burdens and lack of guidance that often accompany a case-by-case method of establishing operating guidelines. See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Second Report and Order and Memorandum Opinion and Order*, 4 CR 484 at ¶ 228 (1996)("Requiring carriers to litigate the meaning of 'reasonable' notice through our complaint process on a case-by-case basis might slow the introduction and implementation of new technology and services, and burden

contrast, a methodology for right-of-way access would minimize the transaction costs of all parties incurred by obtaining or granting access to rights-of-way. Moreover, a methodology would offer prospective guidance for negotiations (negotiations which, the Chief of the Cable Services Bureau recognized, will not be pursued from equal bargaining positions)[16] and, consequently, would decrease the number of complaints for Commission consideration. Finally, the Commission's waiver rules remain available for those circumstances in which a generally applicable methodology would accomplish an injustice.[17] In short, a methodology would serve the public interest and should be developed by the Commission.

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both carriers and the Commission with potentially lengthy, fact-specific enforcement proceedings"); see also International Settlement Rates, IB Docket No. 96-261, *Report and Order*, FCC 97-280 at ¶ 212 (rel. August 18, 1997)("we believe a rule of general applicability is more administratively efficient, and more importantly, would result in greater regulatory certainty . . . than a case-by-case determination").

16 See Letter from Meredith J. Jones, Chief, Cable Services Bureau, Federal Communications Commission to Danny E. Adams, Esq., Kelley Drye & Warren LLP, DA 97-131, at 2 (Jan. 17, 1997)("Section 224, as originally enacted and as amended, acknowledges that parties in a pole attachment relationship do not have equal bargaining positions, and that the potential for barriers to competitive entry emanating from the lack of access or unreasonable rates is significant"). The Commission, too, took notice of Congress' recognition of the general unequal bargaining power between the ILECs and new entrants. See Local Competition Order at ¶ 15 ("Congress recognized that, because of the incumbent LEC's incentives and superior bargaining power, its negotiations with new entrants over the terms of [interconnection, UNE and resale] agreements would be quite different from typical commercial negotiations").

17 See 47 C.F.R. § 1.3.

The Commission has recognized the significant discretion granted to it by Congress to select a methodology for just and reasonable pole attachment rates.[18] Moreover, it has observed that Congress intended a program "that would necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."[19] Consistent with these intentions, the Commission should fashion a simple method of determining just and reasonable right-of-way access rates.

IV. THE PRINCIPLES OF SECTION 224 SHOULD INFORM THE RIGHT-OF-WAY RATE METHODOLOGY ADOPTED BY THE COMMISSION.

The Commission is not without statutory guidance as to the substance of a right-of-way methodology. The statute recommends the application of existing pole attachment and rights-of-way principles to a right-of-way rate methodology. The principles of fair and reasonable rates and nondiscriminatory assessment are contained throughout Section 224. These principles also appear in the only other provision of the Act expressly mentioning rights-of-way: Section 253(c). Section 253(c) retains State and local government authority over management of public rights-of-way insofar as the requisite compensation is "fair and reasonable" and assessed on a "nondiscriminatory basis."[20] The

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18 See Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, *Notice of Proposed Rulemaking*, FCC 97-94 at ¶ 29 (rel. March 14, 1997)("The Commission has significant discretion in selecting a methodology for determining just and reasonable pole attachment rates").

19 Id. at ¶ 4.

20 47 U.S.C. § 253(c).

reappearance of the term "right-of-way" in Section 253(c) along with the same principles found in Section 224 strongly suggests that Congress believed these principles could and should be applied in the right-of-way context as reasonable right-of-way management criteria.[21]

The Commission has interpreted, on several occasions, the meaning of the "just and reasonable" requirement.

> The zone of reasonableness is bounded on the lower end by the utility's incremental costs, and on the upper end by the . . . telecommunications carrier's share of the utility's fully allocated costs of owning and maintaining the poles to which an attachment has been made. Incremental costs are those costs that the utility would not have incurred "but for" these attachments.[22]

Application of this requirement to the right-of-way context is possible in a general sense, but application of the specific formulaic components used for pole and conduit attachments would be awkward, if not unworkable. Teligent recommends the development of a simplified method of calculating what is a just and reasonable rate for access to rights-of-way.

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21 See Kokoszka v. Belford, 417 U.S. 642, 650 (1974)("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature'") (citations omitted).

22 Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, *Notice of Proposed Rulemaking*, FCC 97-94 at ¶ 2 (rel. March 14, 1997); see also Notice at ¶ 5.

Moreover, rates for access to utilities' rights-of-way must be assessed on a nondiscriminatory basis. Both Section 253(c) and Section 224 contain this requirement. The nondiscrimination principle requires, at minimum, that a utility assess a telecommunications carrier no greater share of right-of-way costs than it pays itself. The Commission should ensure that any methodology for right-of-way access rates conforms with this central principle.

V. CONCLUSION

In conclusion, Teligent urges the Commission to ensure that the rights-of-way access granted by Section 224 is not narrowly defined and that just and reasonable rates for such access may be calculated pursuant to a simple methodology. A construction of "right-of-way" to include those areas of building rooftops to which utilities have a right of use or access, and a just and reasonable right-of-way rate methodology, will promote the accrual of the benefits of telecommunication competition to tenants in multi-unit buildings while reducing transaction costs and increasing administrative efficiencies.

Respectfully submitted,

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Dated: September 26, 1997

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	CS Docket No. 97-151
	)	
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	

REPLY COMMENTS OF TELIGENT, L.L.C.

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October 21, 1997

TABLE OF CONTENTS

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	CS Docket No. 97-151
	)	
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	

REPLY COMMENTS OF TELIGENT, L.L.C.

Teligent, L.L.C. ("Teligent")[1] hereby submits its Reply Comments in the above-captioned proceeding.[2]

I. INTRODUCTION AND SUMMARY

Because the input costs of telecommunications services will be reflected in the rates of end users, unreasonable right-of-way access rates will result in diminished industrial rivalry and in decreased financial benefits that consumers can expect from local exchange competition. Rights-of-way are essential facilities controlled by incumbents with historic monopolies. This simple

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1 Teligent was formerly known as Associated Communications, L.L.C.

2 Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Notice of Proposed Rulemaking*, FCC 97-234 (rel. August 12, 1997) ("Notice").

fact must inform the Commission's response to the incumbents' recommendations to leave right-of-way access rates to negotiations. A new entrant's negotiations with an incumbent monopolist to gain access to essential facilities -- facilities which cannot be duplicated but which are necessary to the provision of service -- are not likely to result in cost-based just and reasonable rates. Rather, monopoly rents will be extracted and the "benefits" of competition will accrue not to consumers, but to the incumbents.

To avoid this scenario, the Commission should devise a methodology applicable to rates for right-of-way access. Through the use of a methodology, the range of acceptable rates for access will narrow and the relative bargaining positions of the negotiating parties will become less unbalanced. Section 224 provides telecommunications carriers access not only to public rights-of-way, but also to rights-of-way over private property. The Commission must ensure that the latter category is not removed from the utilities' access obligations.

II. THE COMMISSION MUST ADOPT A RIGHT-OF-WAY RATE METHODOLOGY TO PROMOTE COMPETITIVE PROVISION OF TELECOMMUNICATIONS SERVICES.

Timely implementation of a right-of-way rate methodology will facilitate competitive entry. The most critical time for right-of-way access is now -- as competitive carriers begin to develop. By contrast, delay in adopting a methodology will not encourage construction of ubiquitous competitive networks but rather will increase the difficulty and expense of obtaining

access to rights-of-way.[3] Moreover, the unreasonably high right-of-way access rates likely to result from the absence of a methodology will pass to consumers and diminish the savings they would otherwise enjoy from competition.

The controllers of the right-of-way bottleneck facilities generally oppose the adoption of a methodology for determining just and reasonable rates for access to rights-of-way. Their position relies primarily on the notion that rights-of-way contours will vary considerably, rendering it difficult to implement a generally applicable methodology.[4] Others more clearly seek maintenance of the status quo. SBC asserts that "[u]tilities and attachers have managed without a formula for conduit for the last 20 years. Likewise, they should be able to handle right-of-way access without the need for any specific Commission rules on the subject."[5] One consortium of electric utilities goes so far as to recommend that the Commission abdicate its statutory obligation of ensuring just and reasonable

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3 The need for a right-of-way methodology is before the Commission with urgency not present in connection with the other matters in this rulemaking. The right-of-way methodology would apply immediately to all telecommunications carriers and cable operators, while the remainder of the issues before the Commission in this rulemaking will not take effect until 2001. Logically, then, the Commission should devote its immediate attention to the adoption of a right-of-way access methodology in accordance with the principles described herein.

4 See, e.g., American Electric Power Service, et. al. ("White Paper Utilities") Comments at 61; Ameritech Comments at 15; U S WEST Comments at 12.

5 SBC Communications Comments at 35.

rates for rights-of-way and to "refrain from any rate regulation of right-of-way whatsoever."[6]

The variation in rights-of-way to which the incumbents refer counsels in favor of a methodology, not against one. The potential for rate and access discrimination increases when easily comparable situations do not present themselves. The relative uniformity of pole attachments facilitates comparisons of rates and access terms which can offer evidence of price gouging, discrimination, and unreasonableness. The difficulty of engaging in comparisons of right-of-way access rates and terms enhances the need for a controlling methodology. Moreover, as the Colorado Springs Utilities notes, a methodology offers guidance, predictability, and uniformity.[7]

A properly crafted methodology will account for the variety of circumstances in which right-of-way access is sought while establishing an objective method of calculating just and reasonable rate levels. Specifically, a generally applicable methodology is possible through use of incremental cost presumptions. In response to the incumbent utilities' comments concerning the inability to design a workable right-of-way rate

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6 White Paper Utilities Comments at 59.

7 See Colorado Springs Utilities Comments at 4. The Colorado Springs Utilities ("CSU") "encourages the FCC to adopt a policy for attachment rates for the use of rights-of-way" and believes that "such a policy may facilitate predictability and uniformity for both the telecommunications providers and the utilities." Id.

methodology, Teligent suggests language in an Appendix to these Reply Comments.

III. SOLE RELIANCE ON NEGOTIATIONS WILL IMPAIR RIGHT-OF-WAY ACCESS AT JUST AND REASONABLE RATES.

Many of the incumbents' proposed alternatives to a methodology promise delay, uneven bargaining, unreasonably high rates and the general perpetuation of monopoly control over essential facilities.[8] Some incumbents recommend that the Commission address complaints on a case-by-case basis, leaving the bulk of the responsibility for obtaining access at just and reasonable rates to private negotiations and contracts.[9]

Sole reliance upon private negotiations will not suffice. The Commission itself has recognized the unequal bargaining power inherent in these negotiations.[10] If the nation's second largest

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8 Moreover, they seek simultaneous impairment of the availability of the Commission's complaint process. For example, GTE recommends a $5,000 amount in controversy minimum for rate complaints (which, if applicable to building-specific right-of-way issues could preclude the filing of any right-of-way access or rate complaints). See GTE Comments at 5. Ohio Edison, Duquesne Light Company, and Union Electric Company urge the Commission to require an aggrieved party to wait six months before it could even begin the complaint process at the Commission (a proposal framed in terms of pole attachment complaints, but which would seem to apply equally to right-of-way disputes). See Ohio Edison Comments at 17; Duquesne Light Company Comments at 18; Union Electric Company Comments at 16-17.

9 See, e.g., Bell Atlantic Comments at 9; Edison Electric Institute/UTC Comments at 30 (rates should be based on negotiated amounts); USTA Comments at 14.

10 See Letter from Meredith J. Jones, Chief, Cable Services Bureau, Federal Communications Commission to Danny E. Adams, Esq., Kelley Drye & Warren LLP, DA 97-131, at 2 (Jan. 17, 1997)("Section 224, as originally enacted and as amended, acknowledges that parties in a pole attachment relationship do not have equal bargaining positions, and that the

interexchange carrier has experienced difficulty in gaining access to a utility's easement to a non-utility private right-of-way through private negotiations,[11] the need to rely on means other than private negotiations for ensuring access becomes apparent. The Commission would contradict its recent statements and would subvert its policy of promoting competition were it to place a competitive carrier's access to rights-of-way, and the level of rates therefor, at the discretion of the incumbent controller of the essential facility.

IV. THE COMMISSION POSSESSES ADEQUATE EXPERIENCE TO REGULATE RIGHT-OF-WAY ACCESS RATES IN A PROSPECTIVE MANNER.

In the Notice, the Commission expressed a lack of experience in confronting right-of-way issues.[12] The incumbent utilities assert that the Commission's lack of experience with right-of-way issues counsels against the adoption of a right-of-way methodology.[13] The Commission's lack of experience with right-

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potential for barriers to competitive entry emanating from the lack of access or unreasonable rates is significant"). The Commission, too, took notice of Congress' recognition of the general unequal bargaining power between the ILECs and new entrants. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 15 (1996) ("Congress recognized that, because of the incumbent LEC's incentives and superior bargaining power, its negotiations with new entrants over the terms of [interconnection, UNE and resale] agreements would be quite different from typical commercial negotiations").

11 MCI Comments at 22-23.

12 See Notice at ¶ 42.

13 See, e.g., SBC Communications Comments at 35; Union Electric Company Comments at 46-47; USTA Comments at 14.

of-way issues is inapposite. Through its regulation of pole attachments, the Commission has developed a considerable level of expertise with the principles that must guide the calculation of rates for right-of-way access. It is the Commission's experience with the relevant operating principles that is valuable, not its experience, or lack thereof, with rights-of-way themselves.

Moreover, the courts have long recognized the Commission's authority to change its policies to account for the dynamic nature of communications.[14] Should further experience with right-of-way issues compel a change in the Commission's methodology, the Commission can address the requisite changes at that time. In the interim period, though, the existence of a methodology will assist greatly as carriers seek to construct alternative networks.

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[14] See, e.g., F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940) ("Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."); see also National Broadcasting Co. v. U.S., 319 U.S. 190, 218-219 (1943) ("True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. . . . the Act gave the Commission not niggardly but expansive powers."); see also Philadelphia Television Broadcasting Co. v. F.C.C., 359 F.2d 282, 284 (D.C. Cir. 1966) ("Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry").

V. A REASONABLE RIGHT-OF-WAY ACCESS RATE SHOULD REFLECT ONLY THE INCREMENTAL COSTS OF ACCESS.

The Commission has interpreted, on several occasions, the meaning of the "just and reasonable" requirement.

> The zone of reasonableness is bounded on the lower end by the utility's incremental costs, and on the upper end by the . . . telecommunications carrier's share of the utility's fully allocated costs of owning and maintaining the poles to which an attachment has been made. Incremental costs are those costs that the utility would not have incurred "but for" these attachments.[15]

Application of this requirement to the right-of-way context is possible in a general sense, but application of the specific formulaic components used for pole and conduit attachments would be awkward. The right-of-way methodology should avoid the complicating and largely inapplicable components of the pole attachment and conduit rates in favor of a simpler approach.

Section 224's pole attachment and conduit rate provisions emphasize, at minimum, the recoupment by the utility of the incremental costs imposed by an attaching entity and, at maximum, the recovery of a proportionate share of the cost of the shared facility from the attaching entity.[16] The same principle is applicable to charges for the use of a utility's right-of-way. To most fully permit the extension of the benefits of competition to consumers, a methodology should assess telecommunications

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15 Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, *Notice of Proposed Rulemaking*, FCC 97-98 at ¶ 2 (rel. March 14, 1997); see also Notice at ¶ 5.

16 See 47 U.S.C. § 224(e)(2).